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In the

Supreme Court of the United States

October Term, 1967

857

Docket No. 30989

JAMES MILLER, a/k/a FRANK JAMES COPPOLA

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 26, 1967.

OPINION BELOW

The opinion of the Court of Appeals, Moore, *Friendly* and Feinberg, Circuit Judges, is reported in 381 F 2d 529. The full text of the opinion is set forth in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 26, 1967. Rehearing was denied on September 26, 1967. The time for filing a petition for Writ of Certiorari was extended to November 25, 1967, by Associate Justice John M. Harlan. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a defendant gets an impartial trial by jury when three of the jurors learn that someone is going to beat them up after the trial, and the Judge merely makes a perfunctory in camera inquiry as to whether the jurors believe they are prejudiced.

2. Whether a defendant gets a fair trial when he is indicted under a patently phony alias allegation. The court refuses to strike the false name, and the prosecution is permitted, on rebuttal, to introduce an eighteen-year-old criminal record having nothing to do with the case.

3. Whether a defendant may constitutionally be convicted of conspiracy to smuggle narcotics solely upon proof of possession of narcotics "unless the defendant explains the possession to the satisfaction of the jury."

4. Whether the Government may lawfully destroy evidence of innocence before the defendant is even arrested and may withhold Jencks Act documents which would reveal that its identification witness was, contrary to his claims, promised a pardon.

5. Whether the Government may lawfully convict a man despite prejudicial, inflammatory newspaper publicity, telephone tapping, and basic unfairness.

STATUTE INVOLVED

The statutory provision involved is Title 21, United States Code, Section 174. It is printed in Appendix A hereto.

STATEMENT

On August 20, 1963, Joseph Michel Caron arrived at the Bridgeport Motor Inn, in the company of his wife, Ida, from Montreal, Canada. Upon arrival he had been instructed to leave his car keys and registration in the car parked in the lot adjacent to the motel.

On that day, a man appeared at the door for about a minute and gave Caron $50.00. Contrary to instructions, Caron drove around Bridgeport, Connecticut, that evening. The next morning he received a phone call and was told not to move his car; and that there would be a delay before it was picked up. On August 22, 1963, the car was missing in the afternoon. Around 4:00 or 5:00 P.M. the contact man again appeared at Carno's motel room for about a minute, gave Caron another $50.00 and the car keys and left.

On his return to Montreal, Caron was asked by Rivard, his boss, "How's Frankie my friend?", referring to the Bridgeport contact. Moreover, although none of the statements made by Caron to the Government mention it, and Caron is first recorded as saying it in the Texas trial, almost two years after his arrest, Caron stated that Rivard told him that "Frankie" is "a hairdresser."

On September 21, 1963, Caron returned to the Bridgeport Motor Inn. On this trip from Montreal, he was accompanied by his wife, Ida, and three of their four children. After checking into the motel around 1:00 P.M., Caron and his family went to the Green Comet Diner, next door to the motel, to eat lunch. While eating, "Frankie," together with another man, interrupted Caron's lunch and suggested that the three of them have a cup of coffee together. Shortly thereafter Caron and "Frankie" drove off in Caron's car. About 1,000 feet away Caron got out. That afternoon, around 5:00 P.M., the Carons found the car parked in the motel parking lot.

On both trips it was claimed by the Government that the Caron car was carrying large quantities of heoin. Caron identified the defendant as the contact man on both trips.

Upon returning to Montreal, Caron was told that he was going to make a trip to Mexico City, Mexico, in October, 1963. This time he was accompanied by his wife, Ida. On October 10, 1963, on the return trip from Mexico City, in the course of a routine inspection at the International Bridge, in Laredo, Texas, Caron and his wife were arrested for smuggling approximately 76 pounds of 99.8% pure heroin into the United States in the back seat and side panels of their car.

Shortly after he and his wife were arrested, Caron began to tell Federal and Canadian authorities of his narcotic smuggling activities. On October 16, 1963, he described Bridgeport "Frank" as "between thirty-eight and forty-two, about five feet ten in height, American man of Italian or Jewish background or ancestry, Roman nose, curly black hair, dark complexioned." (The defendant is neither Italian or Jewish, does not have a Roman nose, and is not dark complexioned.) He identified a photograph of one Frank Mancuso of New York

as the Bridgeport man. Around the same time, he was shown several photographs of the defendant, and he said that while they looked like the man, he was not certain and would have to see him in person.

During this period, Caron displayed concern that his wife was under arrest, and that his children were in Montreal. Mrs. Caron was released, and together with her children, she was kept in protective custody through May, 1966.

In December, 1963, Caron entered a guilty plea to smuggling narcotics in the Federal Court in Laredo, Texas. The charges against Mrs. Caron had been dismissed and in January, 1964, she was granted immunity. While awaiting sentencing, Caron was brought to Connecticut, in February, 1964, to identify the defendant. On the first day Caron was unable to make an identification when he saw the defendant. That night he was interviewed in detail by the Connecticut State Police. The next morning Caron was taken to a point behind the defendant's place of business. He then made an identification. He was returned to Texas and sentenced to 10 years in prison.

A grand jury had indicted the Canadian group, in January, 1964. In March, 1964, the defendant was indicted in a single indictment. This indictment was never acted upon. After Caron insisted on immunity and it was granted, in May, 1964, a third indictment charging this defendant, the Canadians, and the Mexican parties with conspiracy to smuggle narcotics was returned at Houston, Texas.

At about this time, the Customs Service condemned the 1962 Chevrolet that Caron had used on both Bridgeport trips and the Mexican trip. After condemnation, the car was used by the Customs Service along the Mexican border.

Armed with a bench warrant issued on the May, 1964 indictment, on June 19, 1964, a horde of State and Federal agents descended on a women's beauty parlor to arrest the defendant. Thus, the defendant found he was supposed to be "Frank James Coppola, alias James Miller." At the same time, the press was being afforded a "story" that was patently false, garrish in format, and intentionally inaccurate, by the Federal Investigative Agency in charge of the case. In fact, a newspaper automobile accompanied the agents to the scene of the arrest.

After a removal hearing — or what was an appeal from a claimed removal hearing — the defendant was admitted to bail. There followed a series of letters, telephone calls, and conferences with the Government in which the defense asserted the defendant was innocent and asking for and being assured that all leads that the defense could find would be checked. Among the items requested by the defense was the Caron car. The defense was not told that it had been condemned and put into Government service.

Arraignment was delayed for a year because of delays occasioned by the Canadian rendition proceedings. After arraignment, the defense filed motions to strike the alias allegation, for a separate trial, for a bill of particulars, to transfer the case to Connecticut, to dismiss because of induced and false newspaper noteriety, for a severance and separate trial, to dismiss the indictment for jurisdictional reasons, and for discovery. Except for the production of motel records, a disclosure that Caron had identified Mancuso, and an order to produce the Caron car, all of the motions were denied without hearing. A Writ of Prohibition was issued by the Fifth Circuit and the defendant was severed and granted a separate trial, in August, 1965.

In September, 1965, it was determined for the first time that the car had been materially altered from its condition at the time of Caron's arrest. The alteration resulted from its use for 18 months by the Customs Service.

In February, 1966, the defense renewed the motion to strike the alias allegation. This was denied when the Government stated that the alias was an "integral part of the Government's case." A bill of particulars was denied. This time the motion to transfer, in order to support it, required the defense to disclose the names and addresses of every potential defense witness. Only then was the motion granted. The affidavits then made it clear that it would cost over $200,000 just to house and transport the witnesses.

After the case was transferred, the defense re-asserted a request for a bill of particulars, moved to again strike the alias allegation, and for relief from the effect of the newspaper stories. After the bill of particulars was filed, all other motions having been denied, the defense asked for a continuance to prepare the defense keyed to the time set forth in the bill of particulars. This was denied.

The defense was also of the belief that Caron was promised a pardon; that money was being spent to support Mrs. Caron and the children; and, that both Caron and his wife had been made promises of citizenship and of permanent residence in the United States. The court denied all of this discovery except for payments. These disclosed that Mrs. Caron and the children had been paid approximately $5,800.00 to April, 1966.

At the trial, Caron recounted his two trips to Connecticut and the details of his Mexican venture. He persistently contended, among other things, that he had been made no promises

of leniency for testifying. It also appeared that in a private letter to his wife, in March, 1966, he said that he had lied in his identification of the man he called Frank, at Bridgeport, Conn., that he didn't know "Frank." The Government insisted that no such promise of leniency had been made, although 19 days after the trial concluded, the balance of Caron's 10-year prison term was commuted and he was set free.

The trial saw the alias come up in rebuttal only. Then it was established by means of an 18-year-old arrest record, totally unconnected with the charge of narcotics conspiracy, and upon the legal basis that Wilkes-Barre police records are business records of the F.B.I.

The defendant did not testify at the trial. His defense was based on the testimony of about 20 persons who, corroborated by business records, placed him 15 miles away at the times Caron transferred his car to "Frank."

After the trial, while the matter was pending appeal, the defense received a written confession from a man it suspected of having committed the crime. The man who confessed fits perfectly the description given by Caron of Bridgeport Frank. This information, together with narcoanalysis and polygraph examinations of the defendant, and other evidence connecting the confessor to the crime, were disclosed to the Government. Defendant requested the Court of Appeals to postpone its consideration of the petition for rehearing until the investigation by the Government and the defense could be completed and a new trial motion ruled upon. The supporting information and affidavits were conveyed to the Court of Appeals as part of that motion and are, therefore, part of the record below. The Court of Appeals summarily denied the motion, and the petition for rehearing, on September 26, 1967.

REASONS FOR GRANTING THE WRIT

I

IN HOLDING THAT THE EFFECT OF JUROR THREATS DURING THE COURSE OF THE TRIAL IS DISSIPATED WHEN THE JUDGE CONDUCTS A PERFUNCTORY IN CAMERA INQUIRY AS TO WHETHER THE JURORS BELIEVE THAT THE THREATS WILL INTERFERE WITH THEIR DECISION, THE COURT BELOW DISREGARDED THIS COURT'S COMMANDS IN *REMMER V. UNITED STATES* AND DENIED THE DEFENDANT AN IMPARTIAL TRIAL BY JURY.

When the trial was in its fourth week, the deputy clerk informed the judge that threats had come to the attention of some jurors. The judge informed counsel and it was agreed that the judge should inquire to determine the exact nature and source of the threat. Defense counsel expressly urged the court to make the inquiry of the jurors individually and the court agreed to do so. After the inquiry, the judge sealed the transcript and denied the defense's motion for a mistrial. It was not until after the trial; indeed, the day of the hearing on the motion for new trial, that the transcript was disclosed to counsel. It was then learned that the judge had not made the inquiries in the manner in which he had agreed, but had questioned the three jurors together. It was also learned that one of the jurors had been told at a dinner party, "I'm just going to warn you that another man in Litchfield told me that when this is over, that unless you're very careful, that there is a bunch here in Torrington who are going to get after you and beat you up. They don't want to kill you, but they don't like what is going on" (1462a).* The juror who heard this threat then

* References are to Appellant's Appendix below.

discussed it with the two other jurors, in violation of repeated admonitions during trial not to discuss the case.

The trial judge's response to these revelations was to ask the three jurors, in a group, if the threat would "have any effect upon you to decide the case on the evidence . . ." (1463a). The jurors knew that if they didn't want to bear the onus of a mistrial for their own failure to keep their oaths, they had to answer that if would have no effect, and that is what they said. One of the jurors, however, at the urging of another, told the judge that there were two places in Torrington where "dope" was "being peddled" (1464a). It was thus clear that the jurors thought that the dope peddlers in Torrington and the "bunch in Torrington" that was going to beat them up was one and the same. It was also clear, or should have been, that since the jurors attributed the threats to dope peddlers, they were clearly influenced by the threat in believing that the defendant was connected with dope peddling, *i.e.*, guilty. Yet the Court inquired as follows:

> Court: What you are saying is that it may not be a kidding rumor. Somebody may have talked?
>
> Mr. Lester: No, I don't think so.
>
> Mr. Parsons: No, sir. Possibly, but that doesn't affect me any, only to the extent that I have grandsons, and so forth.

This meaningless exchange wholly fails to determine what relationship the jurors saw between the dope peddlers and the threat, and leaves entirely unexplored why the juror was concerned about his grandsons. The poison was not in the silightest removed by the inquiry.

The trial judge's primary concern was clearly expressed to the jurors: "Well, the thing I am most concerned about in this case, naturally, is that we have spent five weeks on it and I don't want to see it go down the drain . . ." (1456a). That the judge was less concerned about protecting the defendant than he was in getting a conviction is indicated by his statement after the trial. "Well, they certainly didn't succumb to the threat, did they? . . . they didn't vote for an acquittal. They voted for conviction." (1539a).

On the day that the transcript of the colloquy with the jurors was first made available to defense counsel, it was pointed out to the court that an effort had been made by the defense to investigate the influence of the threats on the jurors and that the defense had been told by the jurors' attorney that the judge had said that they should refuse to discuss the matter until the judge so ordered (1541a).* A request for a postponement of the new trial motion and permission to investigate was denied.

This Court has long held that "in a criminal case, any private communication with a juror during a trial about the matter pending is . . . presumptively prejudicial . . . [and] the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer v. United States*, 350 U.S. 377, 379. See also *Mattox v. United States*, 146 U.S. 140, 147, *Gold v. United States*, 352 U.S. 985. It is reversible error if the court fails either to "determine the circumstances . . . in a hearing with all interested parties permitted to participate" *Remmer v. United States, Supra*, or if,

* The Court of Appeals thought that the suggestion that the jurors not cooperate in an investigation came from an attorney. The Court was mistaken; the "suggestion" came from the trial judge.

after conducting such a hearing, the record fails clearly to show the communication could not have influenced the juror. *Remmer v. United States*, 350 U.S. 377.

The court below in essence held that it is enough that the judge asks the jurors if they will be influenced and they say no. Yet, it is clear that they were under heavy pressure by the Court's remarks and by their own awareness of having created the problem by violating their oaths, to deny influence. Indeed, it would be fanciful in the extreme to suppose that a juror, no matter how prejudiced, would admit it. The decision below rips the heart out of *Remmer* and leaves any defendant's fate in the hands of rumor mongers.

The court below also patently erred when it held that the defendant had "expressly waived" his right to be present and participate in a hearing. Yet, as the record shows, all that was waived was the right to be present while the court determined the nature of the communication. Even this narrow waiver was accepted by the trial judge with knowledge of the defendant's express reservation of the right to conduct an investigation after the trial (1368a) (subsequently refused by the court), and upon the judge's own representation (upon which he reneged) that the inquiry would be made individually (1388a).

The decision below so clearly undermines a defendant's right to impartial trial by jury that it should be summarily reversed.

II

IN TRYING THE DEFENDANT UNDER A PHONY ALIAS ALLEGATION AND INTRODUCING AN IRRELEVANT EIGHTEEN-YEAR-OLD CONVICTION FOR LAR-

CENY, THE GOVERMENT DENIED THE DEFENDANT A FAIR TRIAL AND ROBBED HIM OF THE PRIMARY VALUE OF HIS RIGHT NOT TO TAKE THE STAND.

Although it well knew that the defendant's name was James Miller, the Government indicted him as "Frank James Coppola, alias James Miller" and provided the press with information from which it was announced that the defendant was "masquerading as a legitimate businessman . . . under the legally changed name of James Joseph Miller." The defense moved prior to trial to strike the name "Frank James Coppola," accompanying the motion with certified copies of his birth certificate, naval records, VA records, and his marriage certificate, all of which stated his name to be James Miller. The Government responded by claiming that the name "Frank James Coppola" was an "integral part of its case" against the defendant, and the motion was denied. The motion was renewed in Connecticut and again denied. Yet the only way in which the allegation was "integral" was that it tied in neatly with the press coverage and was also a more fitting name for a narcotics smuggler.

At the trial, no evidence that the defendant had ever used the name Frank, Frankie, Frank James Coppola, Frank Coppola, or anything of the sort was offered in the Government's case-in-chief. A motion to strike the name was renewed at this time and again denied (1265a, 1266a, 1268a).

Since the defense knew that the Government had an eighteen-year-old arrest record from Wilkes-Barre, Pennsylvania which bore the defendant's fingerprints, a picture of the defendant, and the name "Frank Coppola," the defendant elected not to take the stand. After the defense had concluded its case, however, and during the Government's rebuttal, the

arrest record was offered by the Government and received as a full exhibit. Thus was the defendant cheated out of the benefit of his privilege against self-incrimination, and overwhelmingly prejudiced by a remote and quite irrelevant arrest record. To cap the error, there was absolutely no evidentiary foundation for the arrest record — not a scintilla of evidence as to how the name "Frank Coppola" got on the card or how it might have gotten there, nor where the card had been for eighteen years.

The treatment these issues received by the court below raises grave implications for future criminal cases and charts a clear course for unscrupulous prosecutors. The court first holds that although the indictment which went to the jury room referred five times to the defendant as "Frank James Coppola," the "transposition" of the names was corrected by the trial court when, in its introductory remarks to the *array*, the court said, "The Court has been informed that the defendant's name is James Miller, alias Frank James Coppola." Yet the array was not told by the judge that *the Government* had so informed it and, indeed, the record fails to show that the Government *ever* conceded that there had been a transposition. Moreover, after making the nearly meaningless statement quoted above, the court then read the indictment to the jury, five times calling the defendant "Frank James Coppola," then finished up by saying, "Now I referred here to the defendant as both Frank James Coppola, which is how he is described in the indictment, and to James Miller, alleged to have an alias of Frank James Coppola." This did nothing but add to the prejudice.

The court below also said that the defendant "was referred to as James Miller throughout the trial and in the charge." Yet the trial judge in the charge thrice referred to defendant as

"Coppola," and the prosecution in summation said, "Caron told us he was known as Frank. That was the code name he chose to use. Was he known as Frank? . . . it turned out that James Miller indeed, by his photograph and by his name, is not just James Miller but indeed, he is Frank Coppola" (Tr. 3432). "He goes down to New York and, of course, not as Frank Coppola — you don't sign a register under a name that you have been using in smuggle narcotics" (Tr. 3438).

Treating the indictment as if Miller had been the name and Coppola the alias, the court below held that it was proper to allege an alias. Yet, in the face of Judge Learned Hand's condemnation of aliases in *United States vs. Grayson*, 166 F. 2d. 863, 867, the only justification which the court could muster for an alias in this case was that "without the alias the Government would have been confronted with the point that while the indictment charged 'James Miller,' the proof other than identity related only to "Frank'." This observation, however, merely points out the evil of alias allegations, for the Government in this case *should* have been confronted with the dilemma from which the court seeks to protect it. The fact that the man in Bridgeport was known as "Frank" or "Frankie" and the defendant was not known by such a name was evidence of the defendant's innocence. What the court really held, therefore, is that an indictment may take the place of proof of identity.

Virtually every court which has considered the use of aliases in recent years has condemned the practice. See 87 ALR 2d 1217 (1963). This Court has not considered the matter, however, and the practice persists. Its only justification is to suggest that the defendant has a criminal record. If the defendant, as here, declares his true name, there is no legitimate reason whatever for an alias allegation. In no case has the practice been more abused, nor its consequences been more prejudicial, than in the case below.

As for the arrest record, the court below conceded that "the card was remote" but made the baffling observation that the eighteen-year-old record "had its own significance in indicating that Miller had long been leading a double life." This, despite the total absence of any evidence that during the intervening eighteen-year period he had ever been known by anyone as Frank, was the reason for admitting the record!

Defendant's observation that there had been no competent evidence that the defendant had put the name "Frank Coppola" on the card and that it was therefore hearsay, was met with the strange contention that the card was a business record. Yet the card was plainly not part of the F.B.I. files, and there was no evidence of where the card had been made, who made it, using what procedures, nor where it had been for eighteen years. The court therefore abolished the hearsay rule — at least if the hearsay purports to be a criminal record.

Finally, the court below uttered the incomprehensible *ipse dixit* that defendant was not prejudiced by the failure of the Government to offer the card in its case-in-chief. Yet had the card been offered and reveived at that time, the defendant would have taken the stand and would have offered the testimony of a psychiatrist who conducted narcoanlysis of the defendant. By holding off until the defendant's case was over, the defendant was tricked out of offering this vital evidence. The Government's tactics were not only unconscionable; they were unconstitutional.

The implications of the decision below need not be belabored. Hereafter, virtually any defendant may find himself indicted under a name other than his own and, if he has the temerity to claim that his own name is his name, may find that an arrest record two decades old is offered solely to support

the phony allegation in the indictment. The record may not even be his record, for the Government need offer no evidence that it is. The decision cannot and must not be permitted to stand.

III

IN CHARGING THE JURY THAT THEY COULD CONVICT THE DEFENDANT OF CONSPIRACY TO SMUGGLE NARCOTICS IF THEY FOUND THAT HE POSSESSED NARCOTICS AND HE FAILED TO EXPLAIN IT TO THEIR SATISFACTION, THE COURT INFRINGED DEFENDANT'S PRIVILIEGE AGAINST SELF-INCRIMINATON AND ALSO GAVE THE STATUTE AN INTERPRETATION WHICH RENDERS IT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The defendant, who was charged only with conspiracy to smuggle narcotics in violation of 21 *U.S.C.* §174, was convicted upon the following instruction:

> "... whenever on trial for a violation of this Section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury." (1489a).

This instruction was in contravention of the defendant's constitutional rights for two separate and distinct reasons:

1. In instructing the jury (in the words of the statute) that possession alone is enough to authorize conviction of con-

spiracy to smuggle narcotics from outside the United States, the court eliminated all distinctions between possession of narcotics and conspiracy to smuggle. If the law as given to the jury below were the law, then every individual who ever in his life had possessed L.S.D., peyote, or marijuana, could have been convicted on the indictment below. Manifestly, all that the statute may lawfully authorize is the inference that one in knowing possession of narcotics also knew that they were imported illegally. It does not and cannot supply the remaining elements of conspiracy, as even the Second Circuit itself has held. *United States v. Hernandez*, 290 F 2d 86. In this case, the court below ignored the issue, although it was clearly and squarely raised.

There is plainly no rational connection between mere possession of narcotics and the entire *mens rea* of conspiracy to smuggle. Cf. *United States v. Romano*, 382 U.S. 136. If the statute means what it says, it is unconstitutional. If it does not mean what it says, reading the statute to the jury is plain error.

2. In telling the jury that they could convict "unless the defendant explains the possession to the satisfaction of the jury" the court in this case commented adversely upon the failure of the defendant to take the stand as clearly as did the California court in *Griffin v. California*, 380 U.S. 609 (1965). Although the instruction held invalid in *Griffin* was wordier, it was essentially the same as the one given below. Moreover, the lack of wordiness in the instruction given below, which might be thought to make it less harmful than the one in *Griffin*, was more than compensated for by the fact that the court below spent four pages of its charge discussing the "presumption" under §174 and thus gave the presumption, and this portion of it, more emphasis than any other issue in the case. The adverse inference which would inevitably be drawn

by a jury which heard this instruction was exacerbated by the fact that although defendant had expressly requested that the jury be charged that no adverse inference could be drawn, a charge to which the defendant had an absolute right, *Bruno v. United States,* 308 U.S. 287, the trial judge failed to give this instruction until after the jury had deliberated for twenty minutes. Thus, even if a strongly emphasized no-inference instruction, given in the general charge, might somehow be thought to cancel out the quite contrary charge given in the language of §174, that was not this case. The only instruction which guided the jury's deliberations for the first twenty minutes below was that it could convict "unless the defendant explains . . . to the satisfaction of the jury." Since he had not explained at all, there was only one inference: guilt.

Moreover, when the no-inference instruction was given after twenty minutes' deliberation and without explanation for the delay, the instruction had quite the opposite effect from that which it might have had in the general charge. The jury was left free to infer that the twenty minutes had been spent fighting over whether the instruction would or would not be given, and thus the delay served only to emphasize the fact that the defendant had not testified.

Even without the exacerbating factor, however, the charge was patently an adverse comment and an infringement of constitutional rights. Even in *United States v. Gainey,* 380 U.S. 63, 70, where the Court held that a superficially similar instruction was not adverse comment "in the context of the instructions as a whole," such instructions were expressly disapproved, and *Gainey* was decided more than a year before the trial below. The instruction below was also far more prejudicial than that in *Gainey.* There, the jury was told that it could convict the defendant of possessing a still "unless the defendant

by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury." (Italics supplied.) The italicized portion of the instruction made clear that the explanation need not come from the mouth of the defendant; the instruction below did not. Moreover, the inference permissible in *Gainey* was from presence to possession; the inference authorized by the instruction here was from possession to conspiracy, a far longer leap. The jury was told that it could draw the adverse inference on the whole case.

IV

THE GOVERNMENT, IN IMPROPERLY DESTROYING AND WITHHOLDING EVIDENCE, DEPRIVED THE DEFENDANT OF A FAIR TRIAL.

a. The Government on October 10, 1963, took possession of the car which defendant allegedly received in Bridgeport three weeks earlier, on September 21, 1963. Although the Government witness Caron told the Government about the Bridgeport events at least as early as October 16, 1963, the defendant was not arrested until eight months later, June 19, 1964. Before the Government arrested the defendant it destroyed the evidentiary value of the automobile by putting it into daily use (100a). It was thus impossible for the defendant to usefully examine the car for fingerprints, hair and fiber residues, and other evidence which would support his claim that he had never been in or near the automobile in question. Had the Government preserved the car as evidence it would in all likelihood have revealed or helped reveal the identities of the persons who actually had been in the car three weeks before the car was impounded.

The defense raised this issue in motions to suppress evidence from the car, such motions being filed both in Texas and Connecticut. Requested evidentiary hearings were summarily denied.

In affirming the conviction, the court below opined that "[c]ommon sense tells us that the chance of finding useful fingerprint evidence nearly a year after the event was minimal and nothing in the record undercuts this conclusion." Yet, if the car had been carefully preserved, the facts are at variance with the courts' common sense, as the treatises which petitioner cited show.* Moreover, petitioner was never given the opportunity to put any evidence in the record regarding the longevity of fingerprint, fiber and hair evidence. The court below also avoided the point that the Government had the car three weeks after the event, at a time when it knew that someone would ultimately be accused of having received it in Bridgeport, and in failing either to make its own scientific investigation of the car or to preserve it for the defense, deprived an innocent accused of evidence which would have helped him prove his innocence. *Cf. Brady v. Maryland*, 373 U.S. 83, *Miller v. Pate*, 386 U.S. 1; *Giles v. Maryland*, 386 U.S. 66.

b. The Government hid the Caron children from the defense and strenuously resisted all efforts by the defense to talk to them. A pre-trial motion to take their depositions (84a) was denied. Several requests were made by the defense to interview the children during the course of the trial. In opposition, the (455a). When the court suggested that the children could be Government first asserted concern for the children's safety

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* Soderman and O'Connell, *Modern Criminal Investigations*, 130, 184-195 (1951); Bridges, *Practical Fingerprinting*, 224-225 (1942); Gross, *Criminal Investigations*, 150 (1962); Moreland, *An Outline of Scientific Criminology*, 128-129, 162-166 (1950).

produced for interview without endangering their safety (748a), it became their emotional health (758a). When some details were requested (786a) and found non-existent (850a), a third tack was taken: the "legal guardian" of the children had the absolute right to decide whether the children would be talked to (854a). This one the court bought. Not surprisingly, the "guardian," whose husband was then under cross examination by the defense, elected that the children would not talk (920a). And that was that.

There is no doubt that the court has power to order a prospective witness to submit to an interview during or prior to trial. The assumption of the Government and of the court that everyone has an absolute right to refuse to be talked to is erroneous. Moreover, it was plainly improper to regard Mrs. Caron as competent to exercise this imaginary right for her children. The Sixth Amendment right to compulsory process is meaningless if it permits the Government to hide witnesses from the defense and thus require the defense to call them to the stand without having the slightest inkling of what they might say. No competent lawyer will call a witness under such circumstances. To require him to do so is to deny him the witness.

The two children were present when Bridgeport Frank had coffee with Caron in the Green Comet Diner. Yet the court below decided that the error, if any, was harmless because "the jury would scarcely be impressed if the children (the oldest of whom was then ten) . . . had been unable to identify him three years later." Yet the jury might have been impressed if the children had stated that the man in question wore jewelry or clothing of unique kind, or that his nose was much larger than the defendant's or his skin a very different color. Moreover, had the defense been given an opportunity

to interview the children before trial, when their memories were fresh, it might have obtained clues or leads to other evidence which would help establish the defendant's innocence. The court's speculation that the children had nothing of value to offer is entirely unwarranted.

c. On cross-examination, Caron admitted having applied for a pardon but adamantly denied that he had been promised a pardon for testifying. In his charge to the jury, the court stated, in essence, that there was no evidence that Caron had been promised a pardon and that the claim should be disregarded.* In its brief on appeal below, the Government still denied that Caron had been promised a pardon. Yet three weeks after the trial, Caron's ten-year prison sentence was "commuted to expire at once" (letter from Department of Justice, Office of Pardon Attorney, May 22, 1967, printed in Appendix to petitioner's reply brief below). The facts regarding the promise of a pardon were withheld from the defense

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* The instruction was as follows:

"Now, if you find that the Government has purchased the testimony of Mr. or Mrs. Caron with gold or with liberty, with extra favor, either given or promised to him, you will acquit this accused. I mean such conduct would not only be reprehenible but it would be unconstitutional. So, if you find that to have been the case, you acquit the defendant.

"On the other hand, if you do not find that the Government purchased or agreed to pay the Carons for testifying against the defendant you will, of course, disregard the claim completely.

"There isn't any doubt that some in the Government organization have indicated a belief, or at least some judgment, that Mr. Caron deserves some consideration on an application for a pardon. Well, I don't know what all the nuances of that are and neither do you, I guess, except to what appear here.

"What appeared is that he, as a relatively minor cog in this operation, did tell the whole story. But this determination, whether or not he is entitled to any consideration which might fit in with those considerations that the pardon authority takes into account, is for the Pardon Board. Nobody in the Department of Justice, Criminal Division, has any authority whatsoever to release anybody who has been sentenced to a term of imprisonment by a Judge of the Federal Court. If there is any commutation or alleviation of that sentence it has to be done by the prison authorities through the Pardon Board."

despite repeated motions to obtain them, and despite court orders to produce them.

The defense requested the court before trial to order the tender of all applications, interviews, etc., of the Carons in custody of the Immigration and Naturalization Service (251a). These documents were never produced.

A request was made for statements made by or to Arnold Stone of the Department of Justice, including interviews of Caron, letters or reports to the Bureau of Prisons or the Attorney General (498a). It was represented that no such reports were in the prosecution's files (501a). Yet much later, after both Caron and Stone had testified, some items were delivered up (1255a) and some were sealed (1254a-1255a).

Caron admitted writing a letter to Attorney General Katzenbach regarding a pardon (663a) and to having applied to the Pardoning Attorney for executive clemency (514a). The Government admitted that such letters existed (842a), but they were never tendered.

The above statements were Jencks Act, 18 U.S.C. §3500, statements and would clearly have revealed the truth regarding Caron's expectations and promises of a pardon and other considerations. Withholding such documents was, especially in view of the court's illegal and prejudicial charge on the pardon issue, patently unfair.

V

THE ENTIRE PROSECUTION WAS A FARCE ON JUSTICE, FUNDAMENTALLY UNFAIR, AND PRODUCED THE CONVICTION OF AN INNOCENT MAN.

The tactics used by the Government to obtain an identification of the defendant could not have been better calculated

to produce a mistaken identification. Taking an ignorant, entirely unscrupulous criminal who barely speaks English, holding over his head criminal charges for which he could spend the rest of his life in prison, and offering the alternative of immunity for himself and his wife for numerous crimes in Canada and the United States, Unites States citizenship, support and care for his wife and children, a job for himself and his wife, and a pardon for the one offense for which he was convicted, the Government let him sit in a Texas jail for five months — October 10, 1963, until February 12, 1964 — before it took him to observe the defendant. In the meantime, the witness's identification of one Frank Mancuso as the man in question was somehow determined to be unsatisfactory and more pictures were shown. More and more pictures of the defendant were shown until Caron was ripe for identifying the defendant. Then, with his sentencing still pending, he was taken to Connecticut. Even then, surprisingly, he did not at first identify the defendant; so he was taken back the second day for another look. Then he made the identification. His wife, on the other hand, consistently failed to identify the defendant from pictures right up through the Texas trial of the Canadians, almost two years after the Bridgeport events (984a, 988a, 989a). Although she had earlier testified that she hadn't gotten a good look at he man in Bridgeport, she made a positive identification, finally, at the trial.

After getting its identification, the Government waits until June, 1964, to arrest the defendant, in the meantime keeping close surveillance on him, including tapping his telephones and those of his attorneys (a fact which we have not yet been able to prove but which the Government has not yet, in writing, denied, although asked to do so in the Court of Appeals). In the meantime, the Government seizes the records of the Bridgeport Motor Inn (which it manages to withhold from the de-

fense for two years, after which they are, of course, worthless as a means of trying to find witnesses to the crime), destroys the evidentiary value of the Caron Chevrolet. It is then ready to make its arrest, and it does so in high style, alerting the press and T.V., who are on hand to watch the posse of policemen swoop down on the defendant and raid his beauty parlor. The press is told by the Government that it has broken the largest narcotics ring in history and that the defendant, whose real name is Frank James Coppola, is the number one American figure in the syndicate (104a-109a, 114a-120a, 225a-245a).

Instead of indicting the defendant in Connecticut, the Government indicts him in Texas, and forces him to try to defend himself more than 2300 miles from his home and the place of the crime. A veritable blizzard of motions is filed in Texas asking relief from the press coverage, the technical surveillance, the harassment of witnesses, the destruction of evidence, the suppression of evidence, and virtually all are summarily denied without evidentiary hearing. When the case is finally transferred back to Connecticut, the motions are renewed, and again summarily denied. It is not until April 19, 1966, two and one-half years after the crime and eleven days before trial, that defendant is even furnished with a bill of particulars.

At the trial, the Government fails to produce witnesses which it promised to produce, and keeps others in hiding. Numerous documents relevant to the defense and producible under the Jencks Act, 18 U.S.C. §3500, are not disclosed. Inflammatory and prejudicial evidence is admitted, and the court delivers, in the guise of a charge, a second summation for the prosecution.

As a result, a man who did not meet the description of Bridgeport Frank, a man who, according to the testimony of

customers and employees of his beauty shop, corroborated by business records, was at work, fifteen miles away, when the crimes occurred, was convicted of a heinous offense on eyewitness testimony which Glanville Williams says is "practically worthless." Williams, *The Proof of Guilt*, 119-120 (3d ed. 1963).

This case is unfortunately an excellent illustration of the techniques by which prosecutors and courts, hostile to this Court's efforts to civilize the administration of criminal justice, can undercut those decisions by subtly eroding the traditional procedural rights which have largely, as yet, escaped this Court's attention. Unless the Court supervises the entire criminal process, criminal defendants will be far worse off than they were before *Miranda v. United States*, 384 U.S. 436, and other decisions seeking to compel Governments to be fair when they bring their might to bear against an individual.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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